

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

	x	
	:	
BENNY FITZWATER,	:	CIVIL ACTION
CLARENCE BRIGHT, TERRY PRATER,	:	NO. 2:16-cv-09849
EMMET CASEY, JR.,	:	
CONNIE Z. GILBERT,	:	Consolidated with:
ALLAN H. JACK, SR., and,	:	CIVIL ACTION
ROBERT H. LONG.,	:	NO. 1:17-cv-03861
Plaintiffs,	:	
	:	
-vs-	:	
	:	
CONSOL ENERGY, INC.,	:	
CONSOLIDATION COAL CO.,	:	
FOLA COAL CO., LLC,	:	
CONSOL OF KENTUCKY, INC.,	:	
CONSOL PENNSYLVANIA COAL CO.,	:	
LLC, and KURT SALVATORI,	:	
	:	BENCH TRIAL
Defendants.	:	VOLUME VII
	x	

**TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN T. COPENHAVER, JR.,
SENIOR UNITED STATES DISTRICT JUDGE
FEBRUARY 18, 2021**

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Proceedings recorded by mechanical stenography,
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FITZWATER v CONSOL

1 (The following Bench Trial was held before the
2 Honorable John T. Copenhaver, Jr., Senior United States
3 District Judge, in the case of *Fitzwater, et. al. versus*
4 *CONSOL, et. al*, on Thursday, February 18, 2021, at
5 Charleston, West Virginia.)

6 P-R-O-C-E-E-D-I-N-G-S

9:32 a.m.

7 THE CLERK: All rise.

8 THE COURT: Good morning. Please be seated.

9 MR. TORRES: Your Honor, I think we had just a
10 couple of preliminary matters we wanted to address before we
11 get started with Mr. Mason's deposition.

12 I think Ms. Bates had a couple issues on exhibits.

13 MS. BATES: We were wondering, Your Honor, for the
14 exhibits that have not been admitted, if you would prefer
15 that we withdraw those or if we can leave them as marked but
16 not moved into evidence?

17 THE COURT: If the exhibits have been marked and
18 have been denied, then they'll be part of the record.

19 MS. BATES: If they've never been moved into
20 evidence --

21 THE COURT: I can hardly hear you.

22 MS. BATES: I apologize. If they've never --

23 THE COURT: You might remove your mask.

24 MS. BATES: If they've never been moved into
25 evidence but were marked, would you prefer that we withdraw?

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1 THE COURT: If they've never been moved into
2 evidence, but were used in order to examine a witness, they
3 would need to be in the record. If they were never used for
4 any purpose, they can simply be withdrawn and you can note
5 now what those are.

6 MS. BATES: They are Exhibits 2 and 4 for
7 defendants.

8 THE COURT: And I take it there is no objection to
9 that?

10 MR. POMPONIO: No, Your Honor.

11 THE COURT: Defendant's Exhibits 2 and 4 are being
12 withdrawn.

13 **Defendant's Exhibits 2 and 4 withdrawn.**

14 MR. TORRES: Thank you, Your Honor.

15 Your Honor, regarding Mr. Mason's deposition that we
16 are going to show, we'd like to mark the transcript as
17 Defendant's Exhibit 36-A, and the disc of this deposition as
18 Defendant's Exhibit 36-B. We have the transcripts which we
19 can bring up in a second. The discs are being burned and
20 they'll be delivered here at 10 clock, at which point, when
21 we finish showing the deposition, we can offer 36-B into
22 evidence, as well, if Your Honor is okay with proceeding in
23 that fashion.

24 THE COURT: Any objection?

25 MR. PETSONK: No objection to that, Your Honor.

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1 THE COURT: You may proceed, accordingly.

2 MR. TORRES: Thank you, Your Honor.

3 MR. PETSONK: Your Honor, if I may raise a
4 question at this juncture about this deposition?

5 THE COURT: Do you want to wait until Mr. Torres
6 is back at counsel table?

7 MR. PETSONK: Yes.

8 THE CLERK: 36-A.

9 THE COURT: Go ahead, Mr. Petsonk.

10 MR. PETSONK: Your Honor, I introduced an exhibit
11 to the deposition, which is not included in the transcript
12 here, and so I wanted to offer that exhibit here now, as
13 well, Your Honor, for the Court's consideration in
14 connection with the deposition.

15 THE COURT: What is this now?

16 MR. PETSONK: It's an exhibit to the deposition.

17 THE COURT: Is this something that you handed to
18 the witness during the course of the deposition?

19 MR. PETSONK: I did via the Zoom deposition, Yes,
20 Your Honor.

21 MR. TORRES: Your Honor, we have an objection to
22 the admissibility of the exhibit, which we can deal with
23 after the deposition has been played.

24 THE COURT: So it is not of consequence through
25 the reading of the deposition?

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1 MR. PETSONK: Your Honor, it's -- I simply was
2 seeking to offer the exhibit to the deposition as a trial
3 exhibit here, Your Honor, so that it may be examined by the
4 Court, because it will be subject to, I believe, an
5 objection that the Court will have to consider.

6 THE COURT: But do I understand that it is not
7 necessary to consider the matter until after the deposition
8 has been read?

9 MR. TORRES: We think that's right, Your Honor.

10 THE COURT: Mr. Petsonk, do you agree?

11 MR. PETSONK: I think that's your -- it's Your
12 Honor's preference, yes. I'm fine to it.

13 THE COURT: I need for you folks to tell me the
14 way to proceed. You know what happened.

15 MR. TORRES: Your Honor, we think that Mr. Mason's
16 deposition should be played for Your Honor's consideration,
17 and then at that point we can take up the admissibility of
18 the exhibit.

19 THE COURT: Again, is there any objection to that?

20 MR. PETSONK: There is no objection. That's fine
21 to proceed that way. Thank you.

22 THE COURT: Is it the case that the Court's not
23 going to need the deposition to understand the questioning
24 and answer?

25 MR. TORRES: I don't believe so, Your Honor. We

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1 believe -- it's not necessary.

2 THE COURT: If that is the case, then we'll
3 proceed, Mr. Torres, the way you suggested.

4 MR. TORRES: Thank you, Your Honor. As you
5 suggested.

6 Can we proceed with the deposition, Your Honor?

7 THE COURT: You may.

8 MR. TORRES: Thank you.

9 (Videotaped deposition of Terry Mason played.)

10 (Videotaped deposition of Terry Mason completed.)

11 THE COURT: Do I understand that the last witness
12 is, defendants' last witness is Mr. Kowzan?

13 MR. TORRES: Yes, Your Honor. We have Mr. Kowzan
14 left.

15 THE COURT: And he's ready?

16 MR. TORRES: Yes, Your Honor.

17 THE COURT: Let's recess for 15 minutes. How long
18 will he be?

19 MR. TORRES: Our testimony is, I think, relatively
20 short. I think 15, 20 minutes, at most.

21 THE COURT: Well, let me ask you, also, on the
22 exhibit that's referred to near the end of the deposition,
23 do the parties wish to address that now?

24 MR. PETSONK: Your Honor, I think I -- I don't
25 need to argue it. I tender it for admission. I think I

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1 attempted to do that. And, Your Honor, I can present it if
2 you want to mark it. I don't mean to belabor it, Your
3 Honor.

4 THE COURT: Mr. Torres.

5 MR. TORRES: Your Honor, Mr. Mason testified that
6 some of the information -- I don't think a proper foundation
7 has been laid for its introduction through this witness.
8 Mr. Mason said the information was familiar. He said that,
9 without a date on it, he wouldn't know when it was used. He
10 said that slides that he used had initials on them and
11 dates; that the slides he guessed could have very well been
12 produced after he left.

13 So I don't believe that there's been a proper
14 foundation laid for the -- admission of the exhibit as Mr.
15 Mason testified to.

16 THE COURT: What does it indicate, that these are
17 slides that he used?

18 MR. PETSONK: He stated that they look like slides
19 that he used. He stated he initialed slides that he made
20 changes to. And these slides don't have Mr. Mason's
21 initials on them. So he stated, they look like the slides
22 he used, and he stated if he had made changes to them, his
23 initials would have appeared on them.

24 So his testimony was, these look like the slides that
25 he used, and they don't look like slides as to which he made

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1 any changes.

2 He was able to testify about the contents, the origin,
3 and the purpose for which he used these. So -- that's the
4 nature of his personal knowledge about these slides.

5 MR. TORRES: Your Honor, he said -- for example, I
6 can't tell you if those are the exact numbers. He said,
7 again, the information looked familiar. He didn't know if
8 he used the slides. He didn't know the dates of the slides.

9 I don't think that that -- they are trying to offer
10 these up as his slides, and I think it's pretty clear that
11 they are not. And that, at best, he said that the
12 information in the slides looked familiar. So I don't think
13 a foundation has been laid, Your Honor.

14 THE COURT: At one point, he stated that he dated
15 his slides, and that these weren't dated.

16 MR. TORRES: Correct, Your Honor.

17 THE COURT: At the tail end of his testimony, he
18 indicated that maybe they could have been. And I thought
19 that was somewhat inconsistent. I couldn't quite grasp what
20 was being said. I think I will want to look at the
21 transcript again and at that point make a ruling on the
22 matter.

23 MR. PETSONK: Shall I present it to the clerk,
24 Your Honor?

25 THE COURT: You may. What number is it?

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1 MR. PETSONK: 33.

2 MR. TORRES: Your Honor, before we break, just one
3 last housekeeping matter. We have the discs from Mr.
4 Mason's deposition, we'd like to have that marked and move
5 for the introduction of Mr. Mason's transcript and disc.

6 THE COURT: Let's do that now.

7 MR. TORRES: Yes. Your Honor, we move for
8 admission of Defendant's Exhibits 36-A and 36-B.

9 THE COURT: Any objection?

10 MR. PETSONK: Well, Your Honor, just to clarify,
11 does this include both Volume 1 and Volume 2 of Mr. Mason's
12 transcript, because on the paper you handed me today, it
13 just included Volume 1?

14 MR. TORRES: The Exhibit we tendered was the
15 entire transcript of Mr. Mason's deposition.

16 THE COURT: Well, the transcript seems to cover
17 the whole thing. That's what we heard. But what about the
18 disc?

19 MR. TORRES: The disc does, too, Your Honor.

20 THE COURT: If it does, that answers your
21 question, doesn't it?

22 MR. PETSONK: Yes, Your Honor, it does.

23 THE COURT: Is there any objection to 36-A and
24 36-B?

25 MR. PETSONK: No.

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1 THE COURT: Admitted.

2 **Defendant's Exhibits 36-A and 36-B admitted.**

3 THE COURT: Let me ask you, there were a number of
4 objections, most of which were pro forma, in various of
5 these depositions. Except for Plaintiff's 33, are the rest
6 of them withdrawn?

7 MR. TORRES: Yes, for defendants, Your Honor.

8 MR. PETSONK: Yes, and, likewise, for the
9 plaintiff.

10 THE COURT: And I'm speaking now about all of the
11 depositions?

12 MR. PETSONK: Correct.

13 MR. TORRES: Correct.

14 THE COURT: That are in evidence.

15 MR. PETSONK: That's correct, Your Honor.

16 MR. TORRES: Yes.

17 THE COURT: Thank you.

18 We'll be in recess for 15 minutes.

19 THE CLERK: All rise.

20 (A recess was taken at 10:52 a.m. until 11:10 a.m.)

21 THE CLERK: All rise.

22 THE COURT: Please be seated.

23 MR. TORRES: Your Honor, before we begin with Mr.
24 Kowzan, I did have one matter. The plaintiffs had asked us
25 about another stipulation concerning some employee numbers.

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1 The most efficient way for us to try and determine whether
2 the information is accurate would be to speak to Mr.
3 Salvatori. And so, in order to do that, I'd need Your
4 Honor's permission to ask him about the information that the
5 plaintiffs have asked us to stipulate to.

6 THE COURT: And when do you propose to do that?

7 MR. TORRES: Well, they just gave it to us on the
8 break. Your Honor, I could certainly call him right now. I
9 could call him when we finish with Mr. Kowzan. It was just
10 brought to our attention. I'm just trying to figure out the
11 most efficient way to make it happen.

12 THE COURT: As I understand you, when we finish
13 with the last witness, if it is the last witness, you'd be
14 able to get him by telephone, and then in what form would
15 the stipulation come?

16 MR. TORRES: I believe the stipulation would be
17 just the parties could orally enter a stipulation, if we're
18 able to agree to the numbers. But in order to -- if we are
19 able to agree with the figures, verify them, the person who
20 could probably do it the most quickly would be Mr.
21 Salvatori.

22 THE COURT: Do you intend to make the request by
23 telephone from the courthouse?

24 MR. TORRES: Yes, Your Honor.

25 THE COURT: How long would it take you to make the

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1 request?

2 MR. TORRES: I could call him right now, Your
3 Honor, if you prefer, before we start.

4 THE COURT: If it's going to be the case where
5 some examination needs to be made, then we wouldn't be
6 getting an immediate answer. That's what I'm really after,
7 whether or not you are getting an immediate answer?

8 MR. TORRES: I would not be able to get an
9 immediate answer. They are asking us about information from
10 five years ago, Your Honor.

11 THE COURT: And so how long will it take for a
12 search to be made once you pose the question?

13 MR. TORRES: I don't know the answer, Your Honor.
14 Only because, as I said, it's old information. All I can
15 ask Mr. Salvatori, as quickly as possible, could we
16 determine whether these numbers are accurate or not.

17 THE COURT: Well, do you think this is something
18 that if you made the request before him now, you would have
19 the answer when we finish with this witness?

20 MR. TORRES: I hope so, Your Honor. I certainly,
21 the sooner I ask him, obviously, the sooner I can get a
22 response.

23 THE COURT: Well, let's try to get that in before
24 this case record is closed on this hearing.

25 MR. TORRES: Yes, Your Honor.

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1 THE COURT: And can you tell me what the
2 stipulation is about?

3 MR. TORRES: It's the plaintiff's stipulation,
4 Your Honor.

5 MR. PETSONK: It's just the number of individuals
6 affected by the termination of the plan at issue here. We
7 think we can stipulate to that. We think that Mr. Salvatori
8 should be able to confirm that number. We provided all the
9 evidence to support the proposed stipulation, and Mr.
10 Salvatori should be able to reference that.

11 THE COURT: Can you state for the Court now what
12 exactly it is that you propose so there will be no question
13 about the response?

14 MR. PETSONK: Yes. Mr. Pomponio has that number.

15 THE COURT: Mr. Torres, I may want you to recess
16 long enough to make the telephone call now.

17 MR. TORRES: Yes, Your Honor.

18 THE COURT: Before we begin with this witness.

19 MR. POMPONIO: Your Honor, the plaintiffs propose
20 that the parties stipulate that 3,052 active and retired
21 plan participants were affected by the 2015 termination of
22 the plan.

23 THE COURT: That covers it?

24 MR. PETSONK: It would be the 2014 curtailment and
25 the 2015 elimination.

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1 THE COURT: What is it that you are asking now?
2 Let's do it once. Why can't you just get together and
3 confer with each other and provide a simple statement?

4 MR. POMPONIO: 3,052 active and retired plan
5 participants were affected by the 2014 curtailment of the
6 plan benefits and the 2015 termination.

7 MR. TORRES: Your Honor, may I be excused just to
8 call Mr. Salvatori and pose that question to him?

9 THE COURT: You may. We'll be in recess for 10
10 minutes.

11 THE CLERK: All rise.

12 (A recess was taken at 11:18 a.m. until 11:31 a.m.)

13 THE CLERK: All rise.

14 THE COURT: Please be seated.

15 Mr. Torres, did you make contact?

16 MR. TORRES: Yes, Your Honor.

17 Your Honor, I spoke with Mr. Salvatori. He's trying to
18 look into the matter and understands Your Honor's desire to
19 hear back sooner rather than later as to whether we can
20 agree to the numbers that were provided to us a couple of
21 minutes ago from counsel.

22 THE COURT: Thank you.

23 MR. TORRES: You're welcome.

24 Your Honor, defendants call Gerald Kowzan.

25 THE CLERK: Mr. Kowzan, if you'd please raise your

KOWZAN - DIRECT

1 right hand.

2 **GERALD KOWZAN, DEFENDANT'S WITNESS, SWORN**

3 THE CLERK: Please state your name and spell it
4 for the record.

5 THE WITNESS: Gerald Kowzan, G-E-R-A-L-D,
6 K-O-W-Z-A-N.

7 THE CLERK: Thank you.

8 **DIRECT EXAMINATION**

9 **BY MR. TORRES:**

10 **Q.** Mr. Kowzan, good morning.

11 **A.** Good morning.

12 **Q.** Where do you currently live, Mr. Kowzan?

13 **A.** Englewood, Florida.

14 **Q.** Are you a party to this lawsuit?

15 **A.** No.

16 **Q.** Why did you agree to come testify today?

17 **A.** I was a long-term employee of CONSOL, and they were
18 good to me, and I was subpoenaed.

19 **Q.** You were subpoenaed?

20 **A.** Yes.

21 **Q.** Thank you. When did you begin your employment at
22 CONSOL?

23 **A.** December 1984.

24 **Q.** When did you retire from CONSOL?

25 **A.** May 1st 2015.

KOWZAN - DIRECT

1 Q. And when you were hired in at CONSOL in 1984, what was
2 your first position?

3 A. I was in accounting. I was in accounting.

4 Q. Thank you. How long were you in accounting?

5 A. About two years.

6 Q. So until about 1986?

7 A. Yes.

8 Q. What happened in 1986?

9 A. I switched over to Human Resources.

10 Q. Okay. And where were you located?

11 A. I was a -- I started out as a personnel assistant at
12 the Wheeler Creek, W-H-E-E-L-E-R, Creek Mine in Illinois.

13 Q. Illinois. How long were you in Illinois?

14 A. I was in Illinois until May -- or -- April of 2003.

15 Q. What happened in 2003?

16 A. I was transferred to Virginia.

17 Q. Okay. And did you have the same job?

18 A. I had the same title, Supervisor of Human Resources for
19 some locations in Virginia.

20 Q. Okay. And were those represented or nonrepresented
21 locations?

22 A. Those were represented.

23 Q. Okay. And how long were you at the Virginia location
24 after you went there in 2003?

25 A. I stayed in Virginia until 2015, until I retired.

KOWZAN - DIRECT

1 Q. Okay. Did your title change -- after you became HR
2 Supervisor in 2003, did you ever have any other positions at
3 CONSOL?

4 A. I was promoted to manager of Central App operations, in
5 2006.

6 Q. And how long did you hold that position?

7 A. Until I retired in 2015.

8 Q. Okay. When you were a HR supervisor then from 2003 to
9 2006, what locations were you responsible for?

10 A. Buchanan, CONSOL of Kentucky, and then when we
11 purchased AMVEST, Fola operations.

12 Q. I think I asked a bad question.

13 When you were the HR supervisor in 2003, where were you
14 located?

15 A. At Virginia.

16 Q. Okay. And what locations were you responsible for
17 beginning in 2003?

18 A. Miller Creek and Amonate.

19 Q. And you said those are represented locations?

20 A. Yes.

21 Q. And when you were manager of HR in 2006, what mines
22 were you responsible for?

23 A. Well, I wasn't directly responsible, but I was over the
24 HR functions for Buchanan, CONSOL of Kentucky, and also
25 Amonate, and Meadow Branch was still open at that time. And

KOWZAN - DIRECT

1 when we purchased Fola -- or AMVEST, then Fola, and there
2 was another surface mine and an underground operation, as
3 well, I can't remember their names.

4 **Q.** Okay. So in terms of this mine, there was 90 union
5 employees when you become HR that would have been Buchanan,
6 CONSOL of Kentucky, and later on, the AMVEST-Fola operation?

7 **A.** That is correct.

8 **Q.** All right, thank you. I apologize for the confusion.
9 While you were the HR -- Manager of HR, beginning in
10 2006, what, if any, responsibility did you have for CONSOL
11 Pennsylvania mine sites?

12 **A.** None.

13 **Q.** Mr. Kowzan, while you were the manager of HR, beginning
14 in 2006, were you familiar with CONSOL's retiree medical
15 benefit plans?

16 **A.** Yes.

17 **Q.** And what did those medical plans, if anything, state
18 regarding CONSOL's right to cancel or terminate them?

19 **A.** Well, it was in the Summary Plan Descriptions.

20 **Q.** Okay. What about that?

21 **A.** There was a statement that said that CONSOL had a right
22 to change or to terminate.

23 **Q.** Thank you. Focusing again on the time period from 2006
24 until your retirement, Mr. Kowzan, did you have any
25 involvement in employee orientation programs?

KOWZAN - DIRECT

1 **A.** Yes.

2 **Q.** At what locations?

3 **A.** Well, the ones I mentioned.

4 **Q.** Okay.

5 **A.** Buchanan, CONSOL Kentucky, Fola operations.

6 **Q.** Okay. And in those orientations that you participated
7 in, Mr. Kowzan, what portion of your orientation would you
8 cover?

9 **A.** The section that showed the advantages to the
10 union-free operation.

11 **Q.** Okay. In the course of presenting the union-free
12 portion of the orientation, Mr. Kowzan, what, if any,
13 information did you present regarding retiree medical
14 benefits?

15 **A.** None.

16 **Q.** And in conducting the union-free orientations you just
17 referred to, Mr. Kowzan, what, if any, comparisons did you
18 make between UMWA and CONSOL retiree medical benefits?

19 **A.** None.

20 **Q.** Aside from the orientations that you just referred to,
21 Mr. Kowzan -- and, again, focusing on the time period 2006
22 to 2015 -- did you participate in any other presentations
23 for CONSOL employees at which you discussed CONSOL's retiree
24 medical benefits?

25 **A.** Repeat that again .

KOWZAN - DIRECT

1 **Q.** Sure. Putting aside the orientations you just
2 testified about, during the period 2006 to 2015, did you
3 participate in any other presentations to CONSOL employees
4 at which you discussed CONSOL's retiree medical benefits?

5 **A.** The only thing was, when we bought Fola, they did not
6 -- they had their own plans, and we converted them to our
7 plans. And we did a presentation at an Armory in
8 Summersville for the whole family -- well, for the spouse --
9 I shouldn't say for the whole family -- for the spouse, if
10 they wanted to come, as well as the employee. And there was
11 a slide there that -- if I recall, I think it was just one
12 slide there, that talked about what eligibility there was
13 for retiree medical.

14 **Q.** Do you remember approximately when that presentation
15 was, Mr. Kowzan?

16 **A.** It was a couple years after we bought Fola.

17 **Q.** Do you remember when they purchased Fola?

18 **A.** No.

19 **Q.** Okay. Fair enough. And so, again, just to be clear,
20 other than that presentation at the Armory you just
21 testified to, were there any other presentations that you
22 participated in during the period 2006 to 2015, in which you
23 made any presentations regarding CONSOL's retiree medical
24 benefits?

25 **A.** Well, that's the only one I remember.

KOWZAN - DIRECT

1 Q. Okay. Thank you.

2 Mr. Kowzan, do you know Emmett Casey?

3 A. I remember the name.

4 Q. Okay. Do you recall ever making a presentation at Mr.
5 Casey's initial employee orientation at Buchanan?

6 A. No.

7 Q. Okay. Do you recall making presentations at any other
8 meetings where Mr. Casey was present?

9 A. Not particularly, no.

10 Q. Do you recall ever having a conversation with Mr. Casey
11 in any other time regarding the topic of retiree medical
12 benefits?

13 A. No.

14 Q. Did you ever tell Mr. Casey, Mr. Kowzan, that he would
15 have lifetime retiree medical benefits?

16 A. No.

17 Q. Did you ever tell Mr. Casey that his retiree medical
18 benefits would vest?

19 A. No.

20 Q. Did you ever tell Mr. Casey that his benefits would
21 never be terminated?

22 A. No.

23 Q. Did you ever tell Mr. Casey to ignore or disregard in
24 CONSOL's plan the language that said they had the right to
25 modify or terminate retiree medical benefits?

KOWZAN - DIRECT

1 **A.** No.

2 **Q.** Did you ever tell Mr. Casey that you had authority to
3 promise him something different from what was written in
4 CONSOL's plan documents or Summary Plan Descriptions?

5 **A.** No.

6 **Q.** Do you know Mr. Benny Fitzwater, Mr. Kowzan?

7 **A.** I remember the name.

8 **Q.** Do you recall discussing -- I'm sorry.

9 Do you recall having any conversations with Mr.
10 Fitzwater -- strike that.

11 Do you recall making any presentations when Mr. --
12 where Mr. Fitzwater was present?

13 **A.** Not particularly, him, no, or anyone really.

14 **Q.** Okay. Do you recall having any discussions with Mr.
15 Fitzwater regarding his retiree medical benefits?

16 **A.** No.

17 **Q.** Do you recall having any meetings with Mr. Fitzwater
18 regarding his retirement from CONSOL?

19 **A.** No.

20 **Q.** Do you recall ever telling Mr. Fitzwater that he would
21 have lifetime retiree medical benefits, Mr. Kowzan?

22 **A.** No.

23 **Q.** Did you ever tell Mr. Fitzwater that retiree medical
24 benefits would vest?

25 **A.** No.

KOWZAN - DIRECT

1 Q. And did you ever tell Mr. Fitzwater that his benefits
2 would never be terminated?

3 A. No.

4 Q. Did you ever tell Mr. Fitzwater to ignore, disregard
5 language in CONSOL's plan documents that stated CONSOL had
6 the right to modify or terminate benefits?

7 A. No.

8 Q. And did you ever tell Mr. Fitzwater that you had
9 authority to promise him something different than what was
10 written in CONSOL's plan documents or Summary Plan
11 Descriptions?

12 A. No.

13 Q. Just to go to another topic briefly.

14 You said that CONSOL's SPD had reservation of rights
15 language. Do you recall that testimony?

16 A. Yes.

17 Q. While you were in this time period we're talking about,
18 2006 to 2015, do you remember how the Summary Plan
19 Descriptions were distributed to employees?

20 A. They received a copy during orientation, the new
21 employee orientation. And then they would get copies in the
22 mail of whenever -- like, a change to a plan or something
23 would occur.

24 Q. Okay. So these orientations that you referred to in
25 your testimony, in the course of that employer orientation,

KOWZAN - DIRECT

1 one of the things that would happen is they would get a copy
2 of the SPD, correct?

3 **A.** That's correct.

4 **Q.** Okay. Mr. Kowzan, are you familiar with an individual
5 by the name of Clarence Bright?

6 **A.** I remember the name.

7 **Q.** Okay. Do you recall conducting any presentations when
8 Mr. Bright was present?

9 **A.** No.

10 **Q.** Do you recall having any conversations with Mr. Bright
11 regarding retiree medical benefits?

12 **A.** No.

13 **Q.** Do you recall any conversations you ever had with Mr.
14 Bright?

15 **A.** No.

16 **Q.** Did you ever tell Mr. Bright that he would have
17 lifetime retiree medical benefits, Mr. Kowzan?

18 **A.** No.

19 **Q.** Did you ever tell Mr. Bright that his retiree medical
20 benefits would vest?

21 **A.** No.

22 **Q.** Did you ever tell Mr. Bright that his benefits would
23 never be terminated?

24 **A.** No.

25 **Q.** Did you ever tell Mr. Bright to ignore, disregard

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1 language in CONSOL's plan documents that stated that CONSOL
2 had the right to modify or terminate those benefits?

3 **A.** No.

4 **Q.** And did you ever tell Mr. Bright that you had the
5 authority to promise him something different from what was
6 written in CONSOL's plan document or Summary Plan
7 Descriptions?

8 **A.** No.

9 **Q.** Mr. Kowzan, are you familiar with an individual by the
10 name of Terry Prater?

11 **A.** I remember the name.

12 **Q.** Okay. Do you remember making any presentations when
13 Mr. Prater was present?

14 **A.** No.

15 **Q.** Do you remember discussing Mr. Prater's retirement from
16 CONSOL with Mr. Prater?

17 **A.** No.

18 **Q.** Do you remember discussing retiree medical benefits
19 with Mr. Prater at any time?

20 **A.** No.

21 **Q.** Mr. Kowzan, did you ever tell Mr. Prater that he would
22 have lifetime retiree medical benefits?

23 **A.** No.

24 **Q.** Did you ever tell Mr. Prater that his retiree medical
25 benefits would vest?

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1 **A.** No.

2 **Q.** Did you ever tell Mr. Prater that his benefits would
3 never be terminated?

4 **A.** No.

5 **Q.** Did you ever tell Mr. Prater to ignore or disregard
6 language in CONSOL's plan documents that stated CONSOL had
7 the right to modify or terminate retiree medical benefits?

8 **A.** No.

9 **Q.** Did you ever tell Mr. Prater that you had authority to
10 promise him something different from what was written in
11 CONSOL's plan documents or Summary Plan Descriptions?

12 **A.** No.

13 **Q.** Mr. Kowzan, regardless of what conversations you may or
14 may not recall with the individuals we just discussed, at
15 any time during the period 2006 to 2015, did you ever
16 describe CONSOL's retiree medical benefits to any employees
17 as vested?

18 **A.** No.

19 **Q.** Did you ever describe CONSOL's retiree medical benefits
20 during that time to any employee as being lifetime or
21 lifelong?

22 **A.** No.

23 **Q.** Did you ever tell any employee, during that time period
24 from 2006 to 2015, that CONSOL's retiree medical benefits
25 would never change?

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1 **A.** No.

2 **Q.** Did you ever tell any employees during that period,
3 2006 to 2015, that CONSOL's retiree medical benefits would
4 never be terminated?

5 **A.** No.

6 **Q.** Mr. Kowzan, did you ever lie at any time to any
7 employee about their benefits or the duration of those
8 benefits while you were at CONSOL?

9 **A.** No.

10 **Q.** Did you ever tell any employee something different than
11 what was stated in CONSOL's plan documents and Summary Plan
12 Descriptions about the benefits CONSOL offered?

13 **A.** No.

14 **Q.** Did you ever tell any employee, while you were at
15 CONSOL, to ignore or disregard the reservation of rights
16 language in CONSOL's plan documents and Summary Plan
17 Descriptions?

18 **A.** No.

19 **Q.** Did you ever tell any employee that you had the
20 authority to promise him something different from what was
21 written in CONSOL's plan documents and Summary Plan
22 Descriptions?

23 **A.** No.

24 **Q.** Mr. Kowzan, did anyone from CONSOL, while you were
25 there, ever tell you that you had the authority to alter the

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1 terms of CONSOL's written benefit plans?

2 **A.** No.

3 **Q.** Did anyone from CONSOL ever tell you to lie to
4 employees regarding CONSOL's retiree medical benefits?

5 **A.** No.

6 **Q.** Did anyone from CONSOL ever tell you to mislead
7 employees regarding CONSOL's retiree medical benefits?

8 **A.** No.

9 **Q.** Did anyone from CONSOL ever tell you to promise
10 employees that their retiree medical benefits would vest or
11 last throughout their lifetimes?

12 **A.** No.

13 **Q.** Did anyone from CONSOL ever tell you to tell employees
14 that their retiree medical benefits would never be
15 terminated?

16 **A.** No.

17 **Q.** Did anyone from CONSOL ever tell you to tell employees
18 to ignore or disregard the reservation of rights language in
19 the plan documents and SPDs that were distributed during
20 their initial orientations?

21 **A.** No.

22 **Q.** Did anyone from CONSOL ever tell you to make any
23 misrepresentations to employees regarding their retiree
24 medical benefits?

25 **A.** No.

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1 **Q.** And did anyone from CONSOL ever tell you to tell
2 employees that the reservation of rights clause in CONSOL's
3 benefit plans did not apply to retiree medical benefits?

4 **A.** No.

5 MR. TORRES: Thank you, Mr. Kowzan.

6 Nothing further, Your Honor.

7 **CROSS-EXAMINATION**

8 **BY MR. PETSONK:**

9 **Q.** Hi there, Mr. Kowzan.

10 **A.** Morning.

11 **Q.** You testified that you never -- that during the time
12 you were the manager of HR for operations, Central App
13 operations for CONSOL, you never made comparisons between
14 the CONSOL welfare benefits plan and the UMWA welfare
15 benefits plan; is that right?

16 **A.** That's broad. I made some comparisons to the pension
17 plan and wages in presentations.

18 MR. PETSONK: Your Honor, may I approach the
19 witness?

20 THE COURT: You may.

21 MR. TORRES: What document are you showing him?

22 MR. PETSONK: Plaintiff's 11.

23 **BY MR. PETSONK:**

24 **Q.** Mr. Kowzan, I've presented you a document that's
25 stamped Plaintiff's Exhibit 11. And at the top, it's

KOWZAN - CROSS

1 captioned, "Know the Facts About Wage and Benefit
2 Improvements."

3 Does this document look familiar to you? I can
4 explain -- testimony in this case indicates that this
5 document was distributed to CONSOL employees within that
6 Central App Region, within the time frame from '06 to '15,
7 that you were the Manager of HR for Central App?

8 MR. TORRES: Well, I'm going to object, Your
9 Honor. I don't think the testimony in this case was any
10 such thing.

11 He should ask the gentleman whether he's familiar with
12 the document or not, rather than referring to testimony he
13 continues to mischaracterize.

14 MR. PETSONK: He's taking the time --

15 THE COURT: Step back and start anew.

16 BY MR. PETSONK:

17 Q. Have you had time to look at the document, Mr. Kowzan?

18 A. Not yet.

19 Q. Okay. Go ahead and read it.

20 Do you recollect knowing that CONSOL distributed a
21 document resembling this one?

22 THE COURT: Please let the witness finish --

23 MR. PETSONK: I'm sorry, Your Honor.

24 THE COURT: -- and then you can ask him a
25 question.

KOWZAN - CROSS

1 MR. PETSONK: Sure.

2 THE WITNESS: Okay. I've read it.

3 BY MR. PETSONK:

4 Q. Does this document look familiar to you?

5 A. Yes.

6 Q. What do you understand that it is?

7 A. It is a document that was passed out during an
8 organizing campaign at the Fola operations.

9 Q. Would that have been around 2010?

10 A. I don't recall the date.

11 Q. But it was while you were Manager of HR for the Central
12 App operations of CONSOL until 2015, right?

13 A. Yes.

14 Q. So this document, it does state: "Fact: You are
15 eligible for Retiree Healthcare (or a Healthcare
16 Reimbursement Account if you were hired after 1-1-2007) once
17 you have 10 years of service and reach age 55."

18 Is that right?

19 A. That's what the document says, yes.

20 Q. And down at the bottom, it says, "This is a better deal
21 than UMWA negotiated in the national contract. And
22 remember, it didn't cost you a penny in dues or
23 assessments."

24 Right?

25 A. That's what it says.

KOWZAN - CROSS

1 Q. So did you draft this document?

2 A. No.

3 Q. Do you know who did?

4 A. I'm not sure.

5 Q. Did you provide this document to your subordinates
6 within the HR Department?

7 A. No.

8 Q. How did you come into possession of this document?

9 A. It was given to me by someone else.

10 Q. Who gave it to you?

11 A. I'm not sure.

12 Q. Was it a superior of yours within the Human Resources
13 Department?

14 A. He held a higher level, yes.

15 Q. And --

16 A. If it was him who gave it to me.

17 Q. And who are you thinking of?

18 A. Tony Mayer.

19 Q. And what position did Tony Mayer hold in the Human
20 Resources Department of CONSOL during this period?

21 A. I'm not sure.

22 Q. But he was your superior?

23 A. He held a higher position.

24 Q. Okay. Do you recall Mr. Mayer giving you any other
25 documents that made this characterization about eligibility

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1 for retiree healthcare, and that such benefit was superior
2 to the -- or was a better deal than the UMWA national
3 contract?

4 MR. TORRES: Object to the form of the question.
5 He's misstating the document, Your Honor.

6 THE COURT: Please restate the question.

7 BY MR. PETSONK:

8 Q. Do you remember receiving any other document like this
9 for operations other than Fola?

10 A. No.

11 Q. Did you develop slideshows for presentations to
12 employees regarding their welfare benefits while you were
13 Manager of HR for Central App?

14 A. No.

15 Q. But you made such slideshow presentations, right?

16 A. I made presentations about the decision they would have
17 to make, whether to remain a union-free operation.

18 Q. And you presented those at Buchanan, right?

19 A. Yes.

20 Q. And at Fola or the AMVEST properties; is that right?

21 A. Yes.

22 Q. And at CONSOL of Kentucky; is that right?

23 A. Yes.

24 Q. And there is one underground mine you referenced at the
25 AMVEST properties, which I believe is referred to as the

KOWZAN - CROSS

1 Terry Eagle Mine; is that right?

2 **A.** I don't remember it being called that.

3 **Q.** When you made the presentations at the Fola Mine that
4 you've just referenced, what building at that facility did
5 you make them at? If you remember?

6 **A.** The training center.

7 **Q.** At Drennen, West Virginia?

8 **A.** That might have been the location.

9 **Q.** That was CONSOL's training center, at that --

10 **A.** Wherever the training center was located. I don't
11 remember where it was located.

12 **Q.** When you made those presentations, you testified -- if
13 I understand you -- that you didn't create them, but,
14 instead, you received them from someone else in HR at
15 CONSOL, right?

16 **A.** Yes.

17 **Q.** And was that Mr. Mayer in each instance -- or do you
18 recognize other individuals in the Human Resources office at
19 CONSOL giving you the PowerPoint presentations -- or the
20 slideshows you've just referenced?

21 **A.** No. They were there when I got there -- some of them.
22 And we -- they were revised at a later date. But Mayer was
23 gone by then.

24 **Q.** When you say they were there when you got there, are
25 you meaning that they were in your office when you arrived

KOWZAN - CROSS

1 in the position of Manager of HR for Central App?

2 **A.** Yes.

3 **Q.** And where was that office? Was that at the Bluefield
4 office for CONSOL?

5 **A.** No. It was in Oakwood, Virginia.

6 **Q.** Was that the regional office at that time when you
7 became the manager of it?

8 **A.** Yes.

9 **Q.** And was that office previously located at Bluefield?

10 **A.** I don't know.

11 **Q.** Okay.

12 MR. PETSONK: Your Honor, may I approach the
13 witness? Plaintiff's 9. Thank you.

14 THE COURT: You may.

15 BY MR. PETSONK:

16 **Q.** Please take a look at the document I've handed you,
17 which is labeled Plaintiff's Exhibit 9 --

18 MR. PETSONK: And, Your Honor, if I may inquire of
19 another exhibit simultaneously?

20 MR. TORRES: Well, Your Honor, I don't have
21 Plaintiff's 9 as being admitted.

22 MR. PETSONK: May I inquire of the witness about
23 Plaintiff's 12?

24 THE COURT: Let's go back to 9. Are you going to
25 proceed with it or not?

KOWZAN - CROSS

1 MR. PETSONK: I can withdraw it, Your Honor. I
2 had a similar document that was admitted.

3 THE COURT: And so I understand, you're not
4 proceeding on Plaintiff's 9, and go on to the next item.

5 MR. PETSONK: Thank you, Your Honor.

6 THE COURT: This is, what?

7 MR. PETSONK: Plaintiff's 12.

8 BY MR. PETSONK:

9 Q. Mr. Kowzan, does that document look familiar to you?
10 Mr. Kowzan?

11 A. May I take the time to read it?

12 Q. Please do. Yes, absolutely.

13 Plaintiff's 12 is a Benefits Information Sheet and --

14 THE COURT: Just a moment. The witness is
15 obviously reviewing the exhibit.

16 BY MR. PETSONK:

17 Q. Mr. Kowzan, I don't mean to rush you, sir, I'm just
18 curious as to whether you are able to determine if it looks
19 familiar to you yet at this point?

20 A. I don't remember this particular document. But I've
21 seen -- I've seen -- you know, I've seen this.

22 Q. Is this a form document stating information pertinent
23 to the benefits of employees within the company of CONSOL?

24 A. This was -- this was created at a layoff, a
25 reduction-in-force.

KOWZAN - CROSS

1 Q. So you remember that, around February of 2014, CONSOL
2 conducted a reduction-in-force at the Fola operations; is
3 that what you're referencing?

4 A. I don't -- I didn't remember the date. But it is here,
5 it says, "Effective 2-14-2013." There was a layoff. And
6 this would have been a sheet given to employees.

7 Q. Did you develop the form for this sheet?

8 A. No.

9 Q. Who developed that form?

10 A. Someone in corporate office.

11 Q. Was it -- do you remember who?

12 A. No.

13 Q. When you say the corporate office, you mean the Human
14 Resources Department?

15 A. Yes.

16 Q. And then what you remember is that you received this
17 document from the Human Resources office in Pittsburgh; is
18 that right?

19 A. Yes.

20 Q. And did you meet with employees to assist them in the
21 reduction-in-force that occurred at Fola around this time
22 frame?

23 A. Repeat that again.

24 Q. Did you meet with employees at Fola as part of carrying
25 out the reduction-in-force that occurred in this time frame

KOWZAN - CROSS

1 at that site?

2 **A.** I don't recall.

3 **Q.** The document references Chase Elswick; was he a Human
4 Resources person for CONSOL at the Fola site?

5 **A.** Yes.

6 **Q.** Do you know if Mr. Elswick met with coal miners at the
7 site in carrying out the layoff that occurred around
8 February of 2013?

9 **A.** I don't know.

10 **Q.** Did you customarily travel to the Fola site in your
11 capacity as Manager of Human Resources to assist with Human
12 Resource functions at that operation?

13 **A.** Yes.

14 MR. PETSONK: Your Honor, may I approach? I have
15 one other document.

16 THE COURT: You may.

17 BY MR. PETSONK:

18 **Q.** Here you are, Mr. Kowzan. Mr. Torres asked you about a
19 meeting that CONSOL conducted at the Armory in Summersville,
20 West Virginia.

21 Do you recall that?

22 **A.** Yes.

23 **Q.** And you testified that you presented a slide to -- in
24 the course of that meeting, that addressed retiree welfare
25 benefits. Do you remember testifying that way to Mr. Torres

KOWZAN - CROSS

1 on his examination of you here?

2 **A.** Yes.

3 **Q.** Now, I've presented you this document that's been
4 labeled Plaintiff's Exhibit 34. If you look on the very
5 last page of this document, it is stamped page 91, and then
6 there is another identifying number beneath that that says,
7 CONSOL 000718.

8 Does this page appear to you to be the page that you
9 presented at that meeting at the Armory that you referenced?

10 **A.** Appears so.

11 **Q.** And do you see it says, "Retiree Health and Welfare" as
12 a caption to the page, and it says, "CONSOL Energy" at the
13 top of the page. And it says, "Eligibility - Age 55 and 10
14 years of service (including AMVEST time)," right?

15 **A.** Yes.

16 **Q.** Now, I just handed you this document. And you may not
17 be able to have examined every page at this point, but does
18 this page, page 91, appear to contain any language reserving
19 CONSOL's right to terminate those retirement welfare
20 benefits?

21 **A.** This page just says what it says. I mean -- no, there
22 is nothing about terminating.

23 **Q.** And you're pretty sure that, as you testified earlier,
24 you distributed CONSOL's Summary Plan Descriptions at this
25 event at the Armory; is that right?

KOWZAN - CROSS

1 **A.** I think -- I think the Summary Plan Descriptions at
2 this particular time were mailed later.

3 **Q.** Oh, okay. Okay.

4 MR. PETSONK: I don't have any further questions
5 at this time, Your Honor, other than to move for admission
6 of Plaintiff's Exhibit 34.

7 THE COURT: Any objection?

8 MR. TORRES: Could I have just one second to look
9 at the other 90 pages of this, Your Honor?

10 THE COURT: You may.

11 MR. TORRES: Could I voir dire, Your Honor?

12 THE COURT: You may.

13 MR. TORRES: Thank you, Your Honor.

14 **VOIR DIRE EXAMINATION**

15 **BY MR. TORRES:**

16 **Q.** Mr. Kowzan, do you have this document in front of you
17 still?

18 **A.** Yes. This, yes.

19 **Q.** Okay. Can you hear me okay?

20 **A.** Yes.

21 **Q.** Okay. So counsel was asking you a question about the
22 last page of this, which is page 91. Is that right?

23 **A.** Correct.

24 **Q.** And if you look to the prior page, page 90 -- are you
25 there, sir?

KOWZAN - CROSS

1 **A.** Yes.

2 **Q.** Does that also cover retiree health and welfare?

3 **A.** Yes.

4 **Q.** And if you can tell -- so when you made your
5 presentation at Summersville, which of these two pages would
6 you have covered regarding retiree medical benefits?

7 **A.** Both.

8 **Q.** Both of them, okay. And the first -- the page 90, if I
9 understand this correctly -- and tell me if I'm wrong --
10 this addresses employees who would have been hired before
11 1-1-07; is that correct?

12 **A.** Yes.

13 **Q.** And it's the next page, 91, Mr. Petsonk was asking you
14 about, addresses benefits for employees hired after 1-1-07;
15 is that right?

16 **A.** Yes.

17 **Q.** Okay.

18 MR. TORRES: With that clarification, Your Honor.
19 We have no objection to the admission of the exhibit.
20 You're done, right?

21 MR. PETSONK: Yes.

22 MR. TORRES: Could I just have a minute to check
23 my notes, Your Honor, to see if there is anything I need to
24 cover?

25 THE COURT: Yes.

KOWZAN - REDIRECT

REDIRECT EXAMINATION**BY MR. TORRES:**

Q. Mr. Kowzan, do you have Plaintiff's Exhibit 11 in front of you? That's the document that says, "Know the Facts."

A. Yes.

Q. And I realize you didn't have a specific recollection of the timing of when this document was handed out; is that correct?

A. Besides that it was during an organizing campaign.

Q. At which location?

A. Fola.

Q. Okay. And are you aware of this being used at any other location or at any other time?

A. No.

Q. Okay. Thank you for clarifying that.

And then again, just to be clear, you mentioned -- Mr. Petsonk was asking you some questions about presentations that you made regarding employee benefits. And you referred to the presentation you made at Summersville.

Do you recall that testimony?

A. Yes.

Q. We were just looking at the two pages you covered at that presentation, correct?

A. Correct.

Q. Other than that presentation, do you recall making any

KOWZAN - EXAMINATION BY THE COURT

1 other presentations, you, personally, on employee benefits?

2 **A.** Just -- just -- when we'd make, you know, like, a
3 difference or something like that. And it was -- one of the
4 things we did was a comparison of wages with the UMWA
5 contract and a comparison of pensions.

6 **Q.** Okay. Other than those wage and pension comparisons,
7 do you recall making any other presentations regarding
8 employee benefits?

9 **A.** No.

10 **Q.** Okay. Thank you for clarifying that.

11 MR. TORRES: May I have one minute, Your Honor?

12 THE COURT: You may.

13 MR. TORRES: Thank you, Your Honor.

14 Thank you, Mr. Kowzan. I have no further questions.

15 THE COURT: Is there an objection to Plaintiff's
16 Exhibit 34?

17 MR. TORRES: No objection to Plaintiff's Exhibit
18 34, Your Honor.

19 THE COURT: It is admitted.

20 **Plaintiff's Exhibit 34 admitted.**

21 THE COURT: Anything further?

22 MR. PETSONK: No, Your Honor.

23 **EXAMINATION**

24 **BY THE COURT:**

25 **Q.** Mr. Kowzan, what was the purpose of the meeting at the

KOWZAN - EXAMINATION BY THE COURT

1 Armory in Summersville?

2 **A.** When we -- when we bought AMVEST, we kept them -- they
3 stayed on their own benefits for a year or so.

4 **Q.** Are you talking about Fola?

5 **A.** Yes, mm-hmm. And we were converting them to CONSOL's
6 benefits at the first of the year. And so we rented a
7 location big enough where the employees could come and bring
8 their spouses, and we had two presentations going on at the
9 same time, and to accommodate them over a weekend and see
10 everybody. And so that was the purpose of those meetings,
11 to explain the benefits that they would be going to.

12 **Q.** And the two presentations, those were of groups of
13 employees, some hired before 2007, and some hired after
14 2007?

15 **A.** Yes.

16 **Q.** And you indicated that the Summary Plan Descriptions
17 were distributed after that meeting?

18 **A.** Yes.

19 **Q.** Those were revised Summary Plan Descriptions or were
20 they those that were already in existence?

21 **A.** They weren't in existence, because we were -- they were
22 being printed at that particular time.

23 **Q.** Those who were there were existing employees or wives
24 of existing employees?

25 **A.** Correct.

KOWZAN - EXAMINATION BY THE COURT

1 **Q.** And they were receiving the Summary Plan Descriptions
2 that would have been dealt with at that occasion at a later
3 time?

4 **A.** Correct.

5 **Q.** When would that have been? If you know?

6 **A.** Prior to them having to enroll in the benefits,
7 starting January 1. I can't tell you the exact time. Best
8 recall is, we had the presentations in the late summer, and
9 the Summary Plan Descriptions were then sent to their homes
10 sometime in the fall, with enough time for them to be able
11 to look at them and make a decision on what benefits they
12 wanted to enroll in for the next year when it went into
13 effect.

14 **Q.** Thank you. Are these employees who would have received
15 Summary Plan Descriptions on earlier occasions?

16 **A.** These particular employees?

17 **Q.** Yes.

18 **A.** No.

19 **Q.** Were those new employees?

20 **A.** This presentation here was to current employees and
21 spouses.

22 **Q.** Had they never received a Summary Plan Description
23 before this time?

24 **A.** The Summary Plan Descriptions they had were the --
25 what's called the AMVEST plan -- or AMVEST Company plan.

KOWZAN - EXAMINATION BY THE COURT

1 AMVEST owned Fola, that's who we bought it from.

2 Q. And so CONSOL had just taken them over?

3 A. Right.

4 Q. And they were providing CONSOL's plan?

5 A. Starting at the first of the year.

6 Q. And they were given an opportunity to figure out
7 whether they wanted to involve themselves in it, that is,
8 the various benefits, and they had until what, January, 1,
9 to make that decision?

10 A. Yes.

11 Q. Thank you. Let me ask you one other question.

12 On this exhibit that you have a copy of, I think it's
13 probably the first one that was presented to you -- do you
14 see that?

15 A. Yes.

16 Q. It's Plaintiff's Exhibit 11. I didn't understand
17 exactly what you were saying about whether you recall
18 receiving this "Know the Facts" exhibit from Mr. Mayer, or
19 anybody else, for that matter.

20 Do you recall having received that?

21 A. I've seen it. Whether Mr. Mayer provided this, like, a
22 copy -- here's one for you to have -- I can't say that I
23 have. But I did see this and -- when that organizing
24 campaign was going on up there at Fola.

25 Q. Thank you.

KOWZAN - REDIRECT

1 MR. TORRES: Could I have a few more questions of
2 Mr. Kowzan?

3 THE COURT: You may.

4 MR. TORRES: Thank you, Your Honor.

5 **REDIRECT EXAMINATION**

6 **BY MR. TORRES:**

7 **Q.** Do you remember what year the AMVEST acquisition
8 occurred?

9 **A.** No, I do not.

10 **Q.** Okay, fair enough. Whenever it occurred, at the time
11 it occurred, what benefits were the Fola/AMVEST employees
12 receiving?

13 **A.** The benefits they were on under the AMVEST ownership.

14 **Q.** So they were still getting the benefits from the prior
15 company that --

16 **A.** The prior company.

17 **Q.** And I think you testified in response to the Judge's
18 questions that, at some point after the acquisition, CONSOL
19 decided to move them on to CONSOL benefits, correct?

20 **A.** Correct.

21 **Q.** And that was the reason you had the presentation at the
22 Armory, to explain to them what their new benefits would
23 look like?

24 **A.** Correct.

25 **Q.** And at that time, was there any option to stay on the

KOWZAN - REDIRECT

1 Fola benefits, or were they being told, we are going to give
2 you these benefits in lieu of the Fola benefits?

3 **A.** In lieu of.

4 **Q.** So it wasn't an either/or option?

5 **A.** No.

6 **Q.** And then your recollection is, after that presentation,
7 at some point in time, they were provided Summary Plan
8 Descriptions?

9 **A.** Yes.

10 **Q.** Okay. Thank you for clarifying the sequence there.
11 And then going back to this document; you said that you
12 recall seeing it at some point in time related to organizing
13 activity at Fola, correct?

14 THE COURT: You're referring to Plaintiff's 11?

15 MR. TORRES: I apologize, Your Honor. Yes, it's
16 Plaintiff's Exhibit 11.

17 THE WITNESS: Correct.

18 BY MR. TORRES:

19 **Q.** And if you look at the first paragraph under the
20 heading "Wage and Benefit Improvements" -- do you see that?

21 **A.** Yes.

22 **Q.** Okay. And it makes reference to, "It's been about
23 2 1/2 half years since CONSOL bought AMVEST," correct?

24 **A.** Correct.

25 **Q.** And again, do you have any reason to doubt that -- have

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1 any reason to doubt -- well, you don't remember when you
2 received it, correct? You don't remember when you received
3 the document?

4 **A.** No, I do not.

5 **Q.** That's fair enough.

6 MR. TORRES: Nothing further, Your Honor.
7 Thank you.

8 **RECROSS EXAMINATION**

9 **BY MR. PETSONK:**

10 **Q.** Mr. Kowzan, as to this transition from the Fola
11 benefits to CONSOL's benefits, once CONSOL took acquisition
12 of the Fola properties, did the CONSOL HR Department have
13 responsibility for administering benefits to those miners at
14 Fola?

15 **A.** At the purchase -- right after the purchase? I wasn't
16 involved with it right after the purchase. I don't know.

17 **Q.** You say you weren't involved. Do you know whether
18 CONSOL was involved, that is, did they take responsibility
19 for handling benefits starting right at the time of the
20 acquisition?

21 **A.** I do not know. I wasn't involved. I don't know what
22 happened at that time.

23 **Q.** Well, the documents you've reviewed, at least, seem to
24 indicate that the AMVEST properties were acquired by CONSOL
25 in around '07, and that was during the time you were the

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1 Manager of HR for the Central App Region, right?

2 MR. TORRES: Object to the form of the question.

3 THE COURT: What is the objection?

4 MR. TORRES: Your Honor, I think he's testified he
5 didn't recall when the Fola acquisition occurred.

6 And Mr. Petsonk is trying to get him to agree -- I
7 don't disagree it's 2007, but the witness said he didn't
8 recall.

9 THE COURT: Start over.

10 BY MR. PETSONK:

11 **Q.** You were the manager of the HR function for the Central
12 App Region of CONSOL at the time CONSOL acquired Fola?

13 **A.** Yes.

14 **Q.** And yet, you don't know whether CONSOL, CONSOL HR
15 Department was processing or administering benefits for
16 CONSOL's miners beginning at that -- at that time of the
17 acquisition?

18 **A.** When AMVEST was purchased, at that time, the
19 determination was that it would be a stand-alone facility
20 and it didn't come under the jurisdiction of Central App
21 until at a later date. I don't remember what date that was.
22 And that's when I got involved.

23 **Q.** Okay. I think that clarifies the witness' knowledge.
24 Thank you.

25 MR. TORRES: Nothing further, Your Honor.

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1 THE COURT: And may Mr. Kowzan be excused?

2 MR. PETSONK: Yes, from our standpoint.

3 MR. TORRES: Yes, Your Honor. Thank you.

4 THE COURT: Mr. Kowzan, you're excused. And thank
5 you for being with us. Let me caution you that you are not
6 to discuss your testimony with any other witness until this
7 trial is over, which is just about right now, I hope.

8 THE WITNESS: Okay.

9 THE COURT: And I expect you'll be glad to get
10 back to Florida.

11 THE WITNESS: Yes, I will.

12 THE COURT: Thank you.

13 THE WITNESS: Okay. Thank you.

14 THE COURT: You can probably leave that jacket at
15 the airport.

16 THE WITNESS: I actually drove here. I'm not
17 ready to fly yet. I'm not used to driving on these roads
18 anymore either.

19 THE COURT: Does the defendant have anything
20 further?

21 MR. TORRES: Nothing further, Your Honor.

22 Thank you.

23 THE COURT: And does the plaintiff?

24 MR. POMPONIO: Just the matter of the stipulation.

25 THE COURT: And do you want to check to see if you

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1 have a response?

2 MR. TORRES: If I could step outside and call Mr.
3 Salvatori, I can see where they are at, Your Honor?

4 THE COURT: Somebody go with Mr. Torres and come
5 back and tell us whether he's continuing to get an answer or
6 he can come right back here.

7 MR. TORRES: Thank you, Your Honor.

8 (Mr. Torres and Ms. Bates left the courtroom.)

9 (Pause.)

10 (Ms. Bates re-entered the courtroom.)

11 THE COURT: What did you learn?

12 MS. BATES: I'm sorry to keep you waiting, but Mr.
13 Salvatori is checking with someone on his staff to see if
14 they can confirm it. And they've been working --

15 THE COURT: I can't quite hear you.

16 Would you mind to remove your mask?

17 MS. BATES: He's still on the phone.

18 THE COURT: He's talking to Mr. Salvatori?

19 MS. BATES: Yes. And Mr. Salvatori is checking
20 with his staff.

21 THE COURT: Very good. Thank you.

22 MS. BATES: I'll check back in.

23 THE COURT: And so, I think he believes he's going
24 to get it resolved while he's talking on the phone?

25 MS. BATES: He's trying.

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1 THE COURT: Thank you.

2 (Mr. Torres re-entered the courtroom.)

3 MR. TORRES: Your Honor, I haven't heard --
4 they're fervently looking for this information, Your Honor.
5 It relates to something that happened -- that happened six
6 years ago. So they've got their benefits department trying
7 to confirm whether the information is correct.

8 They just don't want to keep Your Honor waiting.

9 I've asked them -- oh, there they are, Your Honor.
10 Sorry.

11 THE COURT: Go ahead.

12 (Mr. Torres left the courtroom.)

13 (Pause.)

14 (Mr. Torres re-entered the courtroom.)

15 MR. TORRES: Your Honor?

16 THE COURT: Yes.

17 MR. TORRES: Thank you for your patience, Your
18 Honor. So my client is going to e-mail me something
19 momentarily that I can offer as a stipulation based upon
20 their review. The numbers that the plaintiffs asked us
21 about are not correct. I will -- but I can read what our --
22 what we understand the number to be, and then plaintiffs
23 will either agree to that or not.

24 THE COURT: And when do you expect to get that
25 number?

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1 MR. TORRES: He was typing it as I hung up with
2 him, Your Honor. So I told him to e-mail it to me
3 immediately.

4 THE COURT: So that should be coming in
5 momentarily?

6 MR. TORRES: Yes, Your Honor.

7 THE COURT: And let me ask about other matters.

8 I understand, of course, the evidence has concluded,
9 but with respect to the exhibits, has the Court ruled on all
10 of them that have been presented, except for what would be
11 Plaintiff's 19, 20, and 33?

12 MR. PETSONK: Yes, Your Honor. Well, 20 and 33
13 stood out in my memory, and I'll check as to 19.

14 MR. TORRES: We are checking, Your Honor.

15 MR. PETSONK: Yes, that's correct. Your Honor.

16 MR. TORRES: I would agree with those, Your Honor.
17 And the only other open issue I saw, the Plaintiff's Exhibit
18 was Number 10, which they then -- if you recall, they
19 offered 10-A, and I just don't remember if 10 was withdrawn
20 or if there is anything more that needs to be done with
21 that. I believe, Your Honor -- so, any way, that's the only
22 one we saw.

23 THE COURT: 10-A was admitted.

24 What is to be done with 10?

25 MR. PETSONK: I don't know if it's -- that -- my

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1 instinct, Your Honor, is to allow it to remain a part of the
2 record, but I understand it will not be considered.

3 THE COURT: I believe the Court simply needs to
4 rule with certainty on it.

5 MR. PETSONK: Yes, Your Honor.

6 THE COURT: And, as I recall, that was the Enlow
7 Fork exhibit?

8 MR. PETSONK: Correct.

9 THE COURT: It may be that it's already clear upon
10 the record, but I'll review that and decide finally on it
11 and include it for consideration, along with 19, 20, and 33
12 of the plaintiffs'.

13 And any others?

14 MR. TORRES: We didn't have anything else, Your
15 Honor, other than that one.

16 THE COURT: And do the plaintiffs have anything
17 else?

18 MR. PETSONK: No, Your Honor.

19 THE COURT: That seems to cover the record.

20 The next question that I have has to do with the
21 conclusion of the case.

22 And I would ask the parties, first, what further
23 submissions do you suggest?

24 MR. TORRES: Your Honor, at least from the
25 defendants' perspective, given the size of the record, we

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1 thought some type of post-hearing submission in lieu of any
2 sort of oral summations might be of more use to the Court,
3 after we've had a chance to review the transcript, to make
4 sure we are providing something that we think would be
5 useful to the Court in resolving any issues.

6 THE COURT: Well, once you have the transcript,
7 what would you expect to provide?

8 MR. TORRES: A post-hearing brief, Your Honor,
9 that just addressed the two remaining claims in relation to
10 the evidence that was admitted at trial. And, obviously,
11 we'll meet whatever time limits or page limits Your Honor
12 thinks would be appropriate.

13 THE COURT: Thank you.

14 What's the plaintiffs' view?

15 MR. PETSONK: Your Honor, we are prepared to
16 provide a summation here today and to tender a very limited
17 argument or presentation as to remedies, but we can also do
18 that by brief. We could do both.

19 THE COURT: It seems to me that it would be
20 helpful if the parties provided in writing that which you
21 wish to present, and do so after the preparation of the
22 transcript. I want to get this case decided soon. And it's
23 my understanding that the reporter can prepare a transcript
24 within 14 days. And I would ask whether or not one or more
25 of the parties would expect to order the transcript at the

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1 14-day rate?

2 MR. TORRES: We certainly intend to order at
3 whatever rate will allow us to do it as quickly as Your
4 Honor finds helpful.

5 THE COURT: I've spoken to the court reporter, and
6 she tells me that 14 days is about as good as she can do
7 with this in view of other constraints on her time. And so
8 we'll plan on that.

9 Once you receive that, how quickly can the briefs be
10 filed?

11 And do the parties have a proposal as to whether or not
12 the order should be other than the plaintiffs proceeding
13 initially, and then with the defendant following?

14 What do you suggest in that respect?

15 MR. TORRES: That's fine with us, Your Honor. And
16 subject to however much time plaintiffs think they need to
17 file their initial brief, we can file -- you know, we could
18 ask for some period of time after that, once we figure out
19 when they are going to make their submission.

20 MR. PETSONK: I need to confer with my team here
21 so I don't obligate us collectively to submit something
22 sooner than everyone is happy with here.

23 (An off-the-record discussion was held between
24 plaintiffs' counsel.)

25 MR. PETSONK: Your Honor, we would propose that

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1 our brief be tendered on March 22nd.

2 THE COURT: I'm going to ask you to make it March
3 10th.

4 MR. PETSONK: That's fine, Your Honor.

5 THE COURT: And the defendants' response can be by
6 March 20th. And the Court should have enough from you by
7 that time.

8 MR. TORRES: That's fine. March 20th is a
9 Saturday, Your Honor.

10 THE COURT: Then make it the 19th.

11 MR. TORRES: We'll make it whatever you need it to
12 be, Your Honor.

13 THE COURT: If it's reasonable for you to do it.
14 The 10th is in the middle of the week. The 19th would be
15 Friday, as I understand it.

16 MR. TORRES: Yes, Your Honor.

17 THE COURT: And then should the plaintiffs wish to
18 respond with something, I'm going to ask you to do it within
19 four days.

20 MR. PETSONK: Thank you, Your Honor.

21 THE COURT: That is, there may be something you
22 feel needs to be corrected or confronted, and you can do
23 that quickly, if you would.

24 MR. PETSONK: And so I'm clear, that would be the
25 23rd or the 25th for our four-day period for the response?

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1 THE COURT: Well, we said the 19th, and four days
2 later would be the 23rd.

3 MR. PETSONK: Thank you, Your Honor.

4 THE COURT: And with that, I would ask if the
5 parties have anything further?

6 MR. TORRES: We have nothing further, other than
7 just again texting my client to explain Your Honor is
8 awaiting this e-mail they are supposed to be sending.

9 THE COURT: Yes.

10 MR. TORRES: Other than that, we have nothing
11 further.

12 THE COURT: Well, it doesn't look like you're
13 going to get an answer before we recess here momentarily.

14 I'm going to suggest that the parties confer and
15 provide something in writing to the Court.

16 MR. TORRES: Very well, Your Honor.

17 THE COURT: And I hope you are going to be able to
18 reach agreement on it, but we'll just see what you come up
19 with.

20 MR. TORRES: Thank you, Your Honor.

21 THE COURT: I would ask you, if you can respond
22 freely, Mr. Petsonk, on what did you base the three-thousand
23 figure?

24 MR. PETSONK: We based it on two trial exhibits
25 that we had designated, one of which was entered as -- was

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1 moved for entry as Plaintiff's Exhibit 23, Your Honor, but
2 it was -- it was not admitted. And the other -- and I have
3 that document here, and it's -- on pages Bate-stamped 16195
4 and 16196 of that document are two tables setting forth the
5 number of retiree plan participants at the date that is
6 indicated here, which is April of 2015.

7 THE COURT: The date being, again, what?

8 MR. PETSONK: April of 2015.

9 THE COURT: Thank you. Well, that may be helpful
10 to --

11 MR. PETSONK: Your Honor, there is one other
12 document which we did not move. It was designated as a
13 trial exhibit. It's another table that presents the
14 enrollment numbers as of the -- as of 2014 for active
15 workers who were retiree eligible, and that document is
16 designated in our pretrial submission, Your Honor, as a
17 trial exhibit. We did not move for its entry. It's
18 Bate-stamped 15433, CONSOL 15433.

19 THE COURT: Mr. Torres is nodding in agreement
20 that he is aware of it?

21 MR. TORRES: We are aware of the document, Your
22 Honor. That's what I provided to my client to verify this
23 agreement.

24 THE COURT: Finally, I want to ask you one other
25 question, and I don't want to get into it in-depth, but what

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1 is the position of the parties at this juncture with regard
2 to the count having to do with the timeliness, or lack of
3 it, of the presentation of Summary Plan Descriptions? Is
4 that in issue?

5 MR. PETSONK: Yes, Your Honor. Simply for this
6 reason: The new retiree plan that Mr. Salvatori addressed
7 was adopted in 2011. Up until 2011, CONSOL's welfare
8 benefits were all tendered in one unified, one unitary plan.

9 And then for the first time, as of January 1, 2011,
10 CONSOL created a new plan, which was a retiree welfare
11 benefits plan.

12 And it is as to that new plan that we think the
13 testimony throughout the course of the trial was consistent,
14 that the plaintiffs did not receive a copy of the Summary
15 Plan Description for that new plan that they were newly
16 participating in, beginning as of 2011, Your Honor.

17 THE COURT: Let me ask you, is the entire issue on
18 that count then riding on the point you've just made?

19 MR. PETSONK: Yes, Your Honor.

20 THE COURT: And so it all has to do with 2011?

21 MR. PETSONK: Did they receive a copy of that plan
22 within 90 days after becoming participants in that new plan,
23 which became effective in 2011, yes, Your Honor.

24 THE COURT: Thank you.

25 MR. TORRES: As to the timing, Your Honor, we

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1 believe that this claim fails, because in -- after the plan
2 was split in 2011, as Mr. Salvatori testified, the company
3 issued Summaries of Material Modifications to both the
4 active populations and the retired populations, addressing
5 the fact that the plan had been split.

6 And we believe under the Department of Labor
7 regulations that govern this, and ERISA, that, coupled with
8 the 2009 and 2010 SPDs that were in existence, satisfied any
9 notice obligations that the defendant had to communicate the
10 fact that the plan had been split and any changes associated
11 with that.

12 The other thing -- the point I would make, Your Honor,
13 is that in 2011, the date they point to as the trigger,
14 several of the plaintiffs were not even retired yet.

15 So even if you accept the premise that the splitting of
16 the plan triggered a notice obligation, for those
17 individuals who didn't retire until 2013 or 2014, they
18 couldn't argue they were a participant in the retiree plan,
19 because they hadn't yet retired.

20 So for those two reasons, Your Honor, we don't think
21 there is any merit to that point.

22 THE COURT: Thank you.

23 Anything further on that, Mr. Petsonk?

24 MR. PETSONK: No, Your Honor.

25 THE COURT: I am going to expand that to ask you

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1 one other question, and that is, the statute of limitations.

2 What is the position of the parties, if you understand
3 it, on that matter, and maybe it could be simplified to the
4 extent I think the SPD delivery has been simplified?

5 MR. TORRES: Your Honor, to the extent that
6 plaintiffs in their submissions identify the splitting of
7 the plan as the trigger date, the statute of limitations
8 that we believe controls is one year from whenever they
9 claim the alleged violation was.

10 Alternatively, Your Honor, if you tie it to some later
11 point in time, you know, the announcement in 2014 that the
12 plan was going to be terminated, we believe that the -- that
13 the claim is still untimely, because we don't believe they
14 filed their suit within one year of that time, but we don't
15 believe that that's the right time period.

16 THE COURT: You're applying the West Virginia
17 statute?

18 MR. TORRES: Pardon?

19 THE COURT: You're applying the West Virginia
20 statute?

21 MR. TORRES: Yes, Your Honor, because ERISA does
22 not apply a statute of limitation for these types of claims.
23 And so it's well-established that you then borrow the most
24 analogous state statute of limitations; and as we pointed
25 out in our pretrial submission, courts have applied that

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1 West Virginia statute to alleged disclosure violations of
2 this type.

3 THE COURT: Thank you.

4 Mr. Petsonk.

5 MR. PETSONK: My understanding is the only statute
6 of limitations argument that is currently maintained is this
7 one as to the applicable limitations period regarding the
8 claim for failure to timely disclose the Summary Plan
9 Description. And so I will just address that issue, because
10 I understand it's the only statute of limitations issue that
11 is considered now by the Court.

12 THE COURT: I'm not quite sure about that.

13 MR. TORRES: I disagree, Your Honor, completely.
14 I answered the question Your Honor posed, which was as to
15 the SPD claim. We also have a statute of limitations as to
16 the breach of the fiduciary duty claim.

17 THE COURT: Thank you.

18 MR. PETSONK: Your Honor, so I wanted to clarify
19 that before -- I'll address the SPD limitation period.
20 First of all, there is not a limitations period -- unlike
21 the fiduciary duty claim, where ERISA does provide a
22 limitations period -- there is not. And so you have to make
23 the borrowing. The most analogous limitations to the most
24 analogous claim under West Virginia law, we believe, first
25 of all, to be a contract claim, which carries a five-year

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1 statute of limitations. This is in the nature of a
2 contract. It's -- the appropriate limitations period, if we
3 are looking to borrow from West Virginia law, should be the
4 five-year period, Your Honor, first of all.

5 Second of all, if -- even according to Mr. Torres, who
6 looks to Section 5 -- or Chapter 55, Article 2, Section 12
7 of the West Virginia Code, that section of the code offers
8 three potential defaults -- or derivative limitations
9 period, and the most applicable of which is the two-year
10 period under that statute, Your Honor, which applies to
11 claims for damage to property.

12 And this claim that we have in front of Your Honor is a
13 claim in the nature of a -- of the law of trust. It's a
14 claim arising regarding trust property. And that's how Your
15 Honor has, in your Summary Judgment Order, has couched the
16 breach of fiduciary duty claim. That's how it's understood
17 by the Fourth Circuit and most of the sister circuits.

18 And so if 55-2-12 of the West Virginia Code is the more
19 appropriate statute to reference for the purposes of
20 ascertaining the limitations period, then the period set
21 forth in that statute that the Court -- I would invite you
22 to consider -- is the one that applies to damage to
23 property.

24 We've asserted the remedy that we are seeking here is
25 damage to the trust property. And we'll set that forth.

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1 And the last point, the third point as to this SPD
2 limitations issue is, even if it's a two-year or a five-year
3 or a one-year period, the purpose of the claim is that the
4 plaintiffs didn't have notice of the document. So how could
5 they have known that it changed?

6 We think this is exactly the kind of situation where
7 discovery rules should apply to toll the limitations period
8 until the -- until the time in June of 2015, when the
9 plaintiffs were notified that their plan was terminated.
10 And so, regardless of the contract period, the property
11 damage period or even the one-year period, which really
12 should only apply to cases that, you know, that survive
13 death, the period should be tolled, Your Honor, until June
14 16th of 2015, the date when the plaintiffs discovered the
15 nature of the harm that they suffered from not receiving the
16 SPDs.

17 THE COURT: Thank you.

18 Mr. Torres, anything else?

19 MR. TORRES: Just briefly, Your Honor.

20 Again, if the nature of the -- if the triggering event,
21 as I said, they -- they identified 2011 in their submissions
22 as the triggering event.

23 But anyway, in September of 2014, CONSOL announced it
24 was going to terminate these benefits after a period of five
25 years. So if there was any discovery that needed to go on,

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1 the plaintiffs were well aware that, at the latest, as of
2 that date, CONSOL did not consider itself obligated to
3 continue to provide these benefits for life. So that's the
4 latest time that the limitation period could begin.

5 And the case law is very clear, that it's not when the
6 harm is felt, Your Honor, but when the plaintiffs were on
7 notice that the other party intended to take action.

8 So there is no dispute that as of the date in September
9 of 2014, when CONSOL announced this, it clearly was advising
10 the participants -- all of whom admitted getting that
11 letter -- that CONSOL didn't consider itself obligated to
12 provide lifetime benefits.

13 And so if there's a one-year limitation, then they are
14 too late, Your Honor.

15 THE COURT: Thank you.

16 MR. PETSONK: Your Honor? Just because I wanted
17 to clarify in response very briefly, if I may, to something
18 that Mr. Torres said there.

19 He argues that the -- if this is a discovery rule, if
20 Your Honor allows the claims to -- the limitation period to
21 begin running from the date in or around October of 2014,
22 when the plaintiffs were put on notice about a change to
23 their retiree welfare benefits, we think that there is not a
24 dispute that -- that they understood their welfare benefits
25 could change.

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1 The issue here is did CONSOL -- did the plaintiffs
2 understand that CONSOL reserved the right to terminate the
3 benefits. And the plaintiffs did not learn that their
4 benefits were terminated until June of 2015, Your Honor.

5 So the -- the limitation period should not run until
6 the plaintiffs discovered the matter that they are
7 complaining about here in this case, which has been accepted
8 for trial, which is -- which is not that there is a
9 lifetime -- we are not trying the case to argue there is a
10 lifetime plan; we are simply arguing here that there were
11 misrepresentations, as you know, Your Honor, by the apparent
12 agents, and the plaintiffs discovered those
13 misrepresentations -- that is, the plaintiffs learned for
14 the first time on June of 2015, that they wouldn't have
15 healthcare coverage until they were 65. That's when they
16 learned that. It's June of 2015 when they learned that.
17 That's when they discovered the matter of -- the conduct
18 about which they complain in this case.

19 So if it's tolled, it should be tolled from that date,
20 Your Honor.

21 THE COURT: Thank you.

22 The parties will doubtless be addressing those fully in
23 your briefs.

24 And I would ask, finally, anything further?

25 MR. TORRES: Nothing from the defendant, Your

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1 Honor. Thank you for your patience throughout this.

2 MR. PETSONK: No further questions.

3 THE COURT: I want to ask you, as I mentioned a
4 moment ago, see if you can get together immediately on the
5 response that you may learn what it is before you leave the
6 building, and then you can simply file a joint statement, it
7 is hoped, that will contain the stipulation.

8 MR. TORRES: Yes, Your Honor. I just did hear
9 from my client and they asked me to call. They had one
10 thing they wanted to clarify.

11 So as soon as I do that, I will e-mail the other side,
12 and we'll get this resolved one way or the other today, Your
13 Honor.

14 THE COURT: Very good. And thank you.

15 And thank you folks for your appearance and your
16 efforts in this case. We'll await your further submission.
17 Thank you.

18 THE CLERK: All rise.

19 (Proceedings concluded at 1:09 p.m.)
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1 CERTIFICATE OF OFFICIAL REPORTER

2 I, Catherine Schutte-Stant, Federal Official Realtime
3 Court Reporter, in and for the United States District Court
4 for the Southern District of West Virginia, do hereby
5 certify that, pursuant to Section 753, Title 28, United
6 States Code, the foregoing is a true and correct transcript
7 of the stenographically reported proceedings held in the
8 above-entitled matter and that the transcript page format is
9 in conformance with the regulations of the Judicial
10 Conference of the United States.

11
12 s/Catherine Schutte-Stant, RDR, CRR

13 _____ March 9, 2021

14 Catherine Schutte-Stant, RDR, CRR
15 Federal Official Court Reporter
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